

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 12, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-0672-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JHERI R. JOHNSON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Portage County: ROBERT C. JENKINS, Reserve Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

PER CURIAM. Jheri R. Johnson appeals from a judgment of conviction for sexual assault and from a postconviction order denying resentencing. The issues are whether Johnson is entitled to resentencing because: (1) he was sentenced on inaccurate information; (2) the trial court erroneously exercised its sentencing discretion; and (3) Johnson was not offered the opportunity to exercise his right to allocution. We conclude that Johnson

has not shown that the trial court relied on inaccuracies in the Presentence Investigation Report ("PSI"), or that the trial court erroneously exercised its sentencing discretion. We also conclude that Johnson waived his right to allocution. Therefore, we affirm.

Johnson entered a guilty plea to second-degree sexual assault of a child, contrary to § 948.02(2), STATS., and the State dismissed a similar charge and enhancer. The trial court imposed the maximum sentence and denied a postconviction motion for resentencing.

Johnson contends that he was denied due process of law because he is entitled to be sentenced on accurate information. *State ex rel. LeFebvre v. Israel*, 109 Wis.2d 337, 345, 325 N.W.2d 899, 903 (1982). However, trial counsel alerted the sentencing court to the mischaracterizations and unsubstantiated conclusions which demonstrated investigator bias. The sentencing court recognized the investigator's bias and limited its consideration to the significant facts. Johnson also contends that the trial court's postconviction order was inconsistent with its remarks at sentencing.¹ At the postconviction hearing, the trial court recalled the PSI, but reiterated its application of how the sentencing factors supported the sentence it imposed.²

Johnson contends that the trial court must have relied on the inaccuracies and mischaracterizations in the PSI because it imposed the maximum sentence. Johnson is required to specify the inaccuracies in the PSI and persuade us that the trial court relied on those inaccuracies when it imposed sentence. He has not done so.

We review a sentence to determine whether the trial court erroneously exercised its discretion. *State v. Larsen*, 141 Wis.2d 412, 426, 415

¹ In its postconviction order, the trial court noted that the PSI investigator's impressions and recommendation were "appropriate," in claimed contradiction to its concession at sentencing that the PSI investigator was biased against Johnson.

² The trial court recognized that the investigator's assessment was "extreme" and that some of her statements were "questionable," but noted that other statements were "significant" and "appropriate."

N.W.2d 535, 541 (Ct. App. 1987). The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. *Id.* at 427, 415 N.W.2d at 541. The weight given to each factor is within the trial court's discretion. *Cunningham v. State*, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

Johnson contends that the trial court erroneously exercised its sentencing discretion because it imposed the maximum sentence, although no violence was involved and he had not been convicted previously of a sexual offense.³ However, the trial court considered the primary sentencing factors and focused on Johnson's:

age and strength, [that he] took advantage of innocent and practically defenseless girls by taking them to a place where there was no possibility of anyone being available to help. The effects on their lives ha[ve] been overwhelming, I think it's been devastating. A thing of this kind is the most vicious and violent act that can be visited on a young girl. And so I view this a most serious type of offense of a category in which the defendant has been convicted.

The trial court summarized Johnson's attitude as "defiant and unrepentant." The trial court found Johnson to be "a serious threat to society," because he "victimize[s] young girls and that it's necessary that society be protected." The trial court imposed a sentence that exceeded the guidelines because of "the heavy weight of aggravating circumstances," and because Johnson "was preying on a[n] unprotected, innocent child." Because the trial court applied the sentencing factors, we conclude that it properly exercised its discretion.

³ Johnson also claims the trial court erred in considering other charges and unproven offenses because there were no offenses read in at sentencing. However, such consideration by the sentencing court is proper "since those other [unproven] offenses are evidence of a pattern of behavior which is an index of the defendant's character, a critical factor in sentencing." *Elias v. State*, 93 Wis.2d 278, 284, 286 N.W.2d 559, 562 (1980).

Johnson also claims that the trial court's failure to offer him the opportunity to exercise his right to allocution constitutes a denial of due process. Section 972.14(2), STATS., directs the trial court "to ask the defendant why sentence should not be pronounced upon him or her and allow the ... defendant an opportunity to make a statement with respect to any matter relevant to the sentence." Failure to offer *sua sponte* an opportunity for allocution is not reversible error, notwithstanding this statutory directive. *Nicholas v. State*, 49 Wis.2d 678, 683, 183 N.W.2d 8, 11 (1971). While the Wisconsin Supreme Court has recognized allocution as a due process right, *State v. Borrell*, 167 Wis.2d 749, 772, 482 N.W.2d 883, 891 (1992), Johnson has waived this right. When the trial court did not ask Johnson if he wished to make a statement before it imposed sentence, trial counsel did not object or request that Johnson have that opportunity, despite counsel's repeated interjections during the trial court's sentencing remarks.⁴

By the Court.—Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

⁴ Johnson did not raise this issue in his postconviction motion for resentencing.